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80-1768

No. .....

In the Supreme Court of the United States

October Term, 1980

THOMAS LANCI,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO

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TABLE OF CONTENTS

	Page
APPENDIX A: Entry of Ohio Supreme Court Dismissing Appeal (2/20/81)	A1
APPENDIX B: Entry of Ohio Supreme Court Overruling Leave to Appeal (2/20/81)	A2
APPENDIX C: Journal Entry and Opinion of the Eighth District Court of Appeals (9/25/80)	A3
APPENDIX D: Journal Entry of the Cuyahoga County Court of Common Pleas (9/6/78)	A26
APPENDIX E: Relevant Constitutional and Statutory Provisions Which This Case Involves	A27-A33

APPENDIX A

Entry of the Ohio Supreme Court Dismissing Appeal

(Dated February 20, 1981)

No. 80-1280

THE SUPREME COURT OF OHIO
The State of Ohio, City of Columbus

STATE OF OHIO,
Appellee,

vs.

THOMAS LANCI,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX B

Entry of the Ohio Supreme Court Denying Leave to Appeal

(Dated February 20, 1981)

No. 80-1280

THE SUPREME COURT OF THE STATE OF OHIO
The State of Ohio, City of Columbus

STATE OF OHIO,
Appellee,

vs.

THOMAS LANCI,
Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

APPENDIX C

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

NO. 39907
39906

STATE OF OHIO — APPEAL FROM

APPELLEE — COMMON PLEAS COURT
-vs- — No. CR-38130

THOMAS LANCI (No. 39907)
KENNETH CIARCIA (No. 39906)
APPELLANTS

JOURNAL ENTRY AND OPINION
(Filed September 25, 1980)

CORRIGAN, J:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgement of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This is an appeal by Thomas Lanci and Kenneth Ciarcia, defendants below, from a judgement entered upon the verdict of a jury, which had found each defendant guilty of aggravated murder in connection with the death of Daniel J. "Danny" Greene.

On October 6, 1977, Danny Greene was killed in the parking lot of Brainard Place, Lyndhurst, Ohio, when, as he entered his car, a dynamite bomb, which had been placed in the car parked next to his, was detonated by remote control.

On November 10, 1977, Raymond Ferrito of Erie, Pennsylvania, turned himself in to F.B.I. officials in Pittsburgh, and subsequently confessed to his role in the murder of Greene. Ferrito revealed that, in 1976, he had been solicited by a Cleveland crime syndicate to kill Greene, a rival syndicate leader. In early October of 1977, Ferrito was provided with information, gathered from a tap of Greene's phone line, that Greene was scheduled for a dental appointment at Brainard Place in the afternoon of October 6.

On that date, Ferrito and a Ronald Carabbia met two other individuals, one named "Tony", at Brainard Place to attempt the murder of Greene. Their plan required that Tony and his companion first try to shoot Greene with a high-powered rifle as he entered Brainard Place. If the opportunity for a clear shot did not present itself, Ferrito and Carabbia would attempt to park a rigged car next to Greene's and blow him up as he left Brainard Place.

Tony and his associate were not able to shoot Greene as he entered Brainard Place, so the alternate scheme was employed. As Ferrito and Carabbia watched Greene approach his car to leave, Carabbia electronically detonated the bomb in the car parked next to Greene's. The explosion which ensued caused Greene's death.

From the information supplied to them by Ferrito, the F.B.I. learned that the two men with Ferrito and Carabbia on October 6, 1977 were Louis J. Aratari, aka Tony DeMarco, Tony Rome, and Gino, and Renaldo A. Guiliani, *aka* Victor Guiles and Renaldo A. Guiles. Aratari was arrested on February 27, 1978, and Guiliani or Guiles, on March 1, 1978.

Aratari and Guiles, like Ferrito, confessed to their roles in the killing of Greene. Aratari revealed that, in the summer of 1977, he had been recruited by Thomas Lanci, one of the appellants herein, to participate in an ongoing conspiracy to

murder Danny Greene and other members of the "Irish Gang". Aratari, in turn, recruited his friend, Vic Guiles, a supposed marksman, to assist him in the endeavor.

Initially, Aratari and Guiles, supplied with information, weapons, and transportation from Lanci, his uncle Kenneth Ciarcia, the other appellant herein, and Anthony Liberatore, stalked lesser members of the Irish Gang. In September, 1977, however, they were assigned to work together with Ferrito and Carabbia exclusively in the plot to kill Greene.

On October 6, 1977, they were present with Ferrito and Carabbia at Brainard Place and unsuccessfully attempted to set up a hit on Greene when he arrived for his dental appointment. Aratari and Guiles later witnessed the positioning of the bomb car next to Greene's by Ferrito and Carabbia, but did not remain on the premises to witness the explosion itself.

Acting on the information they received from Aratari and Guiles, F.B.I. agents arrested Lanci and Ciarcia on March 3, 1978. On March 7, 1978, a Cuyahoga County Grand Jury indicted Lanci, Ciarcia, Aratari, Guiles, and Anthony Liberatore on three counts of violating R.C. §§2909.02 (aggravated arson), 2903.01 (aggravated murder), and 2923.04 (engaging in organized crime) in connection with the death of Danny Greene.

Prior to trial, Aratari and Guiles entered into a plea bargaining arrangement with the prosecution. Anthony Liberatore, for reasons not appearing in the record, also was not tried with Lanci and Ciarcia. On June 9, 1978, the lower court granted a State motion to jointly try the appellants with John P. Calandra, Sr., who, in a different indictment, had been charged with similar offenses in connection with the death of Greene.

Trial of the charges against Lanci, Ciarcia, and Calandra commenced on June 13, 1978. A lengthy trial ensued. On August 15, 1978, at the conclusion of the presentation of all of the evidence by the parties, the trial court granted Criminal Rule 29(a) motions by each of the defendants with respect to the third count of their indictments, involving the charge of engaging in organized crime. On August 19, 1978, the remaining charges against each defendant were submitted to the jury.

On August 25, 1978, the jury found defendant Calandra not guilty of the remaining charges against him, but, while finding appellants Lanci and Ciarcia not guilty of aggravated arson, found each guilty of aggravated murder, but not guilty of the specifications associated with that count of the indictment.

In timely appealing from the judgement subsequently entered upon this verdict, appellants have assigned, in this consolidated appeal, ten errors, as follow, for review:

I. The trial court erred in failing to discharge appellants pursuant to Ohio's speedy trial statutes, R.C. §§2945.71 through 2945.73.

II. The defendants were denied guaranteed sixth amendment rights set forth below under enumerations (A), (B) and (C).

(A) The trial court's denial of defendants' request for a bill of particulars was in derogation of defendants' constitutional rights.

(B) The defendants were denied the right to equal protection embodied in the fourteenth amendment.

(C) The trial court erred in charging the jury on an uncharged, unindicted crime in derogation of appellants' sixth amendment rights.

III. Where the trial court, in a multiple defendant murder prosecution which included a number of other serious felony charges, summarily excuses the court reporter and reads the jury a written charge: due process is violated when such action results in the charge not being recorded as is specifically required by statute.

IV. The appellant Lanci suffered a prejudicial spill-over effect from the fact that, at his trial for the substantive offenses for which he was convicted, he was also tried for organized crime–a charge predicated on an unconstitutional statute (*I.E. R.C. of Ohio*, §2923.04).

V. Where proof of the crime for which the accused was acquitted is necessary to sustain a conviction of the crime for which he was convicted, the guilty verdict must be regarded as invalid.

VI. The defendant was denied due process, and otherwise substantially prejudiced, as a direct consequence of the following circumstances, set forth below under the enumerations (A), (B) and (C).

(A) Given the state's argument – that is, that the other crimes and wrongs shown by the evidence being assailed occurred in furtherance of a "conspiracy", the admission of such evidence without appropriate instructions, for such reason, or any other purpose collateral to the substantive charges of aggravated murder and aggravated arson, violated due process.

(B) The improper and indefensible admission of considerable evidence, showing other crimes and wrongs, which evidence did not qualify for admission under the state's similar acts statute (*R.C. of Ohio*, §2945.59), the statute under which such evidence was tendered.

(C) Assuming the evidence referred to above qualified for admission under the above-indicated statute, the admission of such evidence as substantive proof of the charges made in the indictment cannot be justified in law, logic or common sense.

VII. The State having failed to make the sufficient showing of good cause required by *R.C. of Ohio* §2945.20, as to why these appellants and their co-defendant should have been joined for trial; the court erred or abused its discretion, or otherwise facilitated a denial of due process, by consolidating this capital case for trial.

VIII. The trial court committed prejudicial error by allowing the prosecutor to try this cause on the basis of an offense, or offenses, not charged in the indictment (*E.G.*, Conspiracy to commit murder) which rulings had the effect of amending the indictment in violation of due process.

IX. The trial court erred in denying appellants' sixth amendment right to confront witnesses.

X. Due process is denied an accused where the conviction has been obtained upon evidence insufficient as a matter of law.

I.

In Assignment of Error I, appellants contend that the lower court erred in denying their motion to discharge made pursuant to R.C. §2945.73. This contention is without merit.

The record reflects that appellants were brought to trial 102 days following their arrests and that moreover, in light of their pre-trial confinement without bond, were arguably [1] entitled to the triple-count provision of R.C. §2945.71 (D). However, the record further reflects that, prior to the ninetieth day of their pre-trial confinement, appellants filed a number of motions the disposition of which extended the time in which the State was required to bring them to trial. R.C. §2945.72(E). Included among these motions were the following: motion for reassignment, filed on March 9, 1978 and granted on April 7, 1978; motion for bail, in which appellants requested an oral hearing and the production of several State witnesses held in federal custody, filed on March 9, 1978, and granted on June 6, 1978; motion to dismiss the indictment, filed on May 16, 1978, and denied on June 13, 1978; and a motion in limine, filed on May 31, 1978, and denied on June 12 and 13, 1978.

[1] There is some indication within the record that appellants were not being held in custody prior to their trial below solely on the pending charges, but were also being held on related federal charges, which would have precluded them for entitlement to R.C. S2945.71(D)'s triple-count provision. *See State v. MacDonald* (1978), 48 Ohio St. 2d 66.

We thus conclude that, although appellants were brought to trial 12 days following the expiration of the 90 day period established by R.C. §2945.71(D), this delay in bringing them to trial was justifiable under the provision of R.C. §2945.72(E). Accordingly, Assignment of Error I is overruled.

II(A)

In two of the three arguments which they pose in Assignment of Error II, appellants assert that their right under the Sixth Amendment to the United States Constitution to be informed of the nature and cause of the accusations against them was violated in the proceeding below. More specifically, appellants submit that the grand jury's indictment, even when supplemented by the information contained in the State's bill of particulars, insufficiently apprised them that the State intended to proceed against each of them as accomplices in the successful conspiracy to murder Danny Greene. As a result, appellants claim they were further prejudiced when the lower court subsequently instructed the jury to determine whether appellants had aided and abetted the aggravated arson and aggravated murder of Danny Greene. We find no merit in these arguments.

The Sixth Amendment right to be informed of the nature and cause of an accusation requires that a criminal defendant be provided with information concerning all of the elements of the offense charged, and that, where statutory language is employed, generic terms be translated into specifics of the alleged criminal act, so that the defendant may understand with reasonable certainty the nature of the charge and be able to prepare his defense. *See Hamling v. United States* (1974), 418 U.S. 87; and *Russell v. United States* (1962), 369 U.S. 749. We conclude, upon reviewing the indictment and bill of particulars, and the evidence produced by the State at trial, that this constitutional requirement was satisfied below.

In each count of the indictment, the State employed the statutory language associated with the offenses charged, and translated, where necessary, generic terms into the specifics of the alleged criminal acts involved. The language of the indictment sufficiently apprised appellants that they were charged with, and would have to defend against, the offenses of aggravated arson, aggravated murder, and engaging in organized crime, all in connection with the death, on October 6, 1977, of Daniel J. Greene.

Appellants, however, assert that, from a reading of this indictment, it was not clear whether they were being charged as principals or accomplices to the offenses alleged. Even assuming that this omission rendered the indictment constitutionally deficient,[2] the deficiency was corrected by the State's bill of particulars. *See State v. Lewis* (1970), 21 Ohio St. 2d 203.

This bill of particulars, in pertinent part, stated that:

> "...the State will prove that Thomas Lanci, Anthony Liberatore, Kenneth Ciarcia, Louis Aratari, Renaldo Guiliani, James Frattiano, Alfred Calabrese, Ronald Carabbia, James Licavoli, John Calandra, Angelo Lonardo, Thomas Sinto, Raymond Ferrito, and Carmen Marconi did knowingly and purposely with the purpose to establish or maintain a criminal syndicate or to facilitate its activities conspire with each other to commit an offense of violence, the Murder of Daniel J. Greene on October 6, 1977, and that such murder was caused by said defendants by means of fire or explosion by co-defendants for hire. The culmination of the conspiracy occurred in the afternoon hours of October 6, 1977 at Brainard and Cedar Roads with the killing of Danny Greene."

[2] In Ohio, an accomplice to the commission of a criminal offense is subject to the same prosecution and punishment as the principal offender, and may be charged in the language of the principal offense. R.C. §2923.03(F). Therefore, one charged with violating a provision of the Ohio Criminal Code is arguably put on fair notice that the State may proceed against him at trial as either an accomplice or principal, and thus should prepare his defense to respond to either theory of culpability. Accordingly, it is debatable whether an indictment in a state criminal proceeding, which fails to indicate whether the defendant is being charged as a principal or as an accomplice, may form the basis of a Sixth Amendment violation.

This language sufficiently apprised appellants that the State intended to proceed against them at trial as accomplices to the murder of Danny Greene. As the transcript of the trial reveals, this was exactly how the State subsequently proceeded with its evidence against appellants. Therefore, we conclude that appellants' right to be informed of the nature and cause of the accusation against them was not violated below.

In light of this conclusion, we, of necessity, further conclude that it was not error to instruct the jury on aiding and abetting in connection with the charged offenses of aggravated arson and aggravated murder in connection with the death of Danny Greene. Accordingly, we find no merit in either of the Sixth Amendment arguments posed by appellants in Assignment of Error II.

II(B)

In their remaining argument within Assignment of Error II, appellants contend that, by prosecuting them under R.C. S2923.03(A) (3), the State violated their right to equal protection of the laws as guaranteed under the Fourteenth Amendment to the United States Constitution. There is no merit in this argument.

Appellants assert that the Ohio Legislature in enacting both R.C. §§2923.01 and 2923.03(A) (3), unconstitutionally delegated to prosecutors' unfettered discretion to subject criminal defendants, charged with identical acts of conspiracy, to different maximum penalties upon conviction. We need not determine whether, as argued, R.C. §§2923.01 and 2923.03 (A) (3) proscribe identical acts, nor need we subject appellants' argument to a detailed equal protection analysis. Absent a showing of discrimination against a class of individuals or that a fundamental interest has been affected, the imposition of different penalties under different criminal statutes for identical acts does not offend the equal protection clause of the Fourteenth Amendment. *United States v. Batchelder* (1979), 99 S. Ct. 2198. *Cf. Skinner v. Oklahoma* (1942), 316 U.S. 535. No such showing by appellants was made below.

Accordingly, we find no merit in this argument, and, as a result, overrule Assignemnt of Error II.

III.

In Assignment of Error III, appellants contend that due process was violated below when the trial court excused the court reporter from making a contemporaneous recording of the written charge the court delivered to the jury. We find this assignment to be without merit.

The record of the proceeding below reveals that, after soliciting proposed instructions from all parties to the trial, the lower court assembled in typewritten form instructions for the jury. At the proper time, the court, reading from these prepared instructions, delivered its charge to the jury. Later, presumably, a copy of this charge was given to the court reporter and transcribed as part of the record. We have no evidence of record before us which demonstrates, nor in fact do appellants even assert, that the charge transcribed into the record was not identical to that given to the jury.

We find no violation of due process to have resulted from the foregoing procedure. Due process, in this regard, merely requires that, where appellate review is an integral part of a State's trial system, a criminal defendant has access to a report of the trial proceeding of "sufficient completeness" to enable a reviewing court to adjudicate the claims he makes in an appeal from his conviction. *See Mayer v. City of Chicago* (1971), 404 U.S. 189; and *Griffin v. Illinois* (1955), 351 U.S. 12. Here, as we have previously noted, there is no assertion by appellants that the record of the trial below, or, more specifically, of the charge given to the jury, was not of sufficient completeness to afford appellants an adequate review in this court.

Appellants additionally argue, however, that this procedure utilized by the trial court violated the requirements of Criminal Rule 22. Even assuming that there is merit in this argument, the error we might thus recognize would clearly have been harmless. *See* Crim. Rule 52(A).

For the foregoing reasons, Assignment of Error III is overruled.

IV

In Assignment of Error IV, appellants contend that they were prejudiced by being tried below on a charge derived from an unconstitutional statute, *viz.*, R.C. §2923.04. We find no cognizable merit in this assignment.

The record reflects that appellants indeed were tried below on a charge of violating R.C. §2923.04 (engaging in organized crime). This statute, subsequent to appellants' trial, was declared unconstitutional by the Ohio Supreme Court in *State v. Young* (1980), 62 Ohio St. 2d 370. While this charge of engaging in organized crime, the record reflects, was dismissed below on a motion for acquittal at the conclusion of the presentation of appellants' defense, appellants submit here that they nevertheless were prejudiced by a spill-over effect of this charge onto the remaining charges which were submitted to the jury.

Even assuming, as appellants submit, that the jury improperly considered in its deliberations evidence probative only of the dismissed count, we cannot agree that reversals of appellants' convictions are, as a result, required. Appellants failed below to request that the trial court eliminate this potential for prejudice by instructing the jury to not consider evidence probative of the organized crime count only. Therefore, appellants waived this possible irregularity in the proceeding below. *See* Crim. Rule 30; and *State v. Lane* (1976), 49 Ohio St. 2d 77.

Moreover, we conclude that this omission in the trial court's instructions to the jury did not amount to plain error. *See* Crim. Rule 52(B); and *State v. Long* (1978), 53 Ohio St. 2d 91. The evidence of appellants' guilt as accomplices in the murder of Danny Greene was substantial. *See* discussion, *infra*, Part X. Further, the dismissed count of engaging in organized crime was related to the remaining two counts submitted to the jury, and much, if not all, of the evidence, admitted as probative of the organized crime count, was also probative of the aggravated arson and aggravated murder counts. *See* discussion, *infra*, Part VI. Additionally, the record reveals that appellants' trial counsel, working together with State's counsel, were able to agree upon removing from the jury's inspection many of the State's exhibits which appellants contended were related only to the dismissed count. (Tr. 7212-14; 7220-22; 7225-26; 7683-97) Finally, the court did instruct the jury not to consider the dismissed organized crime count. (Tr. 7224) For these reasons, we do not find the court's failure to have

instructed the jury not to consider any testimonial evidence probative of the dismissed count only, even if error, to have resulted in a "manifest miscarriage of justice". *State v. Long, supra.*

Accordingly, Assignment of Error IV is overruled.

V.

In Assignment of Error V, appellants submit that their convictions below of aggravated murder are invalid because of inconsistency both within that count of the indictment itself and between that count and another count within the indictment. Specifically, appellants argue, first, that the jury could not consistently have acquitted them of a charge of aggravated arson, and at the same time have found them guilty of one of aggravated murder, where the aggravating circumstance in the murder charge was the aggravated arson of which they had been acquitted. Second, appellants argue that the jury was inconsistent in finding them guilty of the aggravated murder of Danny Greene "while committing or attempting to commit...Aggravated Arson", but not guilty of either of the aggravated circumstances, *i.e.* "aggravated arson" and "for hire", specified within that count of the indictment. We find these arguments to have no legal merit.

It has long been the law within this State that there need not be consistency between verdicts on separate counts of a criminal indictment. *See State v. Adams* (1978), 53 Ohio St. 2d 223; *State v. McNicol* (1944), 143 Ohio St. 39; *Browning v. State* (1929), 120 Ohio St. 62; and *Griffin v. State* (1868), 18 Ohio St. 438. In so holding, Ohio courts have followed what appears to be the majority rule. *See* Annot., 18 A.L.R. 3d 259 (1968).

While logic may, at first blush, seem to have taken a back seat in the formulation of this rule, there is nevertheless good reason for its existence. Perhaps best expressive of this reasoning is the following statement by Justice Holmes in *Dunn v. United States* (1932), 284 U.S. 390, 393-94:

"As was said in Steckler v. United States (C.C.A. 2d) 7F. (2d) 59, 60:

" 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'

"Compare Horning v. District of Columbia, 254 U.S. 135, 65 L. ed. 185, 41 S. Ct. 53.

"That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters."

Thus, matters where a jury has been properly instructed and where the finding of guilty they return on a count or counts of the indictment is supported by sufficient evidence, the majority rule concludes that inconsistency between these findings and those on related counts, where an acquittal instead is returned, is not grounds for the reversal of a conviction on appeal. Thus, applied here, perhaps logic, but neither appellants' substantive rights nor justice, was offended by the jury's verdict below. Accordingly, we find no cognizable merit in appellants' argument that the inconsistency between the jury's verdicts on the related counts of the indictment rendered their convictions invalid.

Moreover, we find no internal inconsistency within the verdict finding appellants guilty of aggravated murder, but not guilty of either of the attendant specifications. A verdict of guilty on a count of aggravated murder is not in any manner dependent upon findings which the jury may subsequently deliver upon specifications included within that count pursuant to R.C. §2929.04. *See State v. Perryman* (1976), 49 Ohio St. 2d 14, 26. Thus, where a jury finds a defendant guilty of

aggravated murder, but acquits him of a specification which enumerates an aggravating circumstance identical to that within the charge itself, the verdict itself is not rendered invalid as a result. *State v. Perryman, supra,* syllabus No. 3. Therefore, we find no merit in this second argument advanced herein by appellants.

Accordingly finding no merit in either of appellants' arguments, we overrule Assignment of Error V.

VI

In Assignment of Error VI, appellants, in a three-pronged argument, submit that the trial court erred in admitting evidence of their involvement in other crimes of which they were not charged, *viz.*, the conspiracy and attempts to murder other members of the Irish Gang, and the theft of F.B.I. documents. We find no merit in this assignment of error.

Our review of the record below reveals that evidence of these crimes was admissible under R.C. §2945.59 to prove appellants' "scheme, plan or system" in the conspiracy to murder Danny Greene. *See State v. Lytle* (1976), 48 Ohio St. 2d 391; and *State v. Curry* (1975), 43 Ohio St. 2d 66. While appellants were entitled to an instruction on the limited purpose for which this evidence might be considered by the jury, none was requested by appellants and therefore they waived any error in the court's omission to so instruct. *See* Crim. Rule 30; and *State v. Lane, supra.* Moreover, we do not find that the failure to so instruct rendered appellants' convictions a manifest miscarriage of justice, thereby causing the omission to rise to the level of plain error. *See* Crim. Rule 52(B), and *State v. Long, supra. Also see* our discussion of a similar issue in Part IV of this opinion, *supra.*

Accordingly, Assignment of Error VI is overruled.

VII.

In Assignment of Error VII, appellants contend that, in violation of Criminal Rule 14, the trial court granted the State's motion to jointly try them and their co-defendant below, John Calandra, without "good cause" having first been shown. We find no merit in this assignment of error.

Whether the State has met its burden of demonstrating "good cause" to jointly try defendants to a capital charge is a matter committed to the sound discretion of the trial court. *See State v. Abbott* (1949), 152 Ohio St. 228, 238-39; and *State v. Fields* (1971), 29 Ohio App. 2d 154.

In the case at bar, the State below advanced the following seven grounds in support of its motion for joint trial:

> "1. All of the defendants acted in concert, in furtherance of a common goal or design, the conspired killing of Daniel J. Greene.
>
> "2. The jury in a joint trial would be better able to weigh the testimony and would be in a better position to render justice in this case.
>
> "3. The testimony and exhibits required would be identical as to the case presented as to each defendant.
>
> "4. The crime charged in a conspiracy requiring proof as to all the defendants and their position in the common plan, thus, the jury could better appraise the part of each in a joint trial.
>
> "5. Only a joint trial would result in a fair, intelligent and complete submission of all the evidence, and separate trials would cause great cost to the State, the witnesses and the jurors.
>
> "6. The State does not intend to use any out-of-court statements by any defendant on trial made to law enforcement officers during custodial interrogation.
>
> "7. The State intends to use direct testimony of witnesses who are in fear of death or great bodily harm, including two co-defendants."

In related proceeding, *State v. Cisternino and Carabbia (July 10, 1980), unreported,* Ohio Eighth District Court of Appeals, Nos. 39894 and 39916, we observed that the first, second and seventh grounds above cited have been recognized as sufficient to establish good cause to join. Therefore, we conclude here that the trial court in the proceeding below did not abuse its discretion in granting the State's motion for joint trial. Accordingly, Assignment of Error VII is overruled.

VIII

In Assignment of Error VIII, appellants contend that their right to due process was violated below because they were tried on an unindicted charge, *viz.,* conspiracy to commit murder. *See Watson v. Jago* (6th Cir., 1977), 558 F. 2d 330. We disagree.

Consistent with our previous discussion of appellants' Assignment of Error II, we observe that appellants were tried below, not for the offense of conspiracy to murder Danny Greene, but as accomplices to that murder.

Under R.C. §2923.03(A) (3), culpability as an accomplice may be proven by establishing the defendants' participation in a conspiracy which precedes and which might reasonably be expected to result in the principal offense charged. *See State v. Doty* (1916), 94 Ohio St. 258; and *Goins v. State* (1889), 46 Ohio St. 457. Thus, in the proceeding below, the State produced evidence of the conspiracy to murder Danny Greene, not in an effort to have appellants tried on this unindicted charge, but rather to establish their guilt as accomplices to the murder itself.

In such a prosecution of the principal offense, the State is entitled to the evidentiary advantages of conspiracy law, so long as it demonstrates a *prima facie* case of the existence of the conspiracy it alleges. *Goins v. State, supra.* Our review of the transcript of the trial below leads us to conclude that the State clearly met this burden and thus was entitled to these evidentiary advantages. Accordingly, we find no merit in appellants' argument that, in violation of due process, they were tried below on the unindicted charge of conspiracy to commit murder. Assignment of Error VIII is overruled.

IX.

In Assignment of Error IX, appellants contend that their right, under the Sixth Amendment to the United States Constitution, to be confronted with the witnesses against them was violated below. In support of this contention, they advance the following arguments: first, defense counsel, in their cross-examinations of federally protected witnesses Raymond Ferrito, Louis Aratari, Victor Guiles, and Geraldine Rabinowitz, were "not permitted to elicit testimony relating to exculpatory statements, bias or prejudice, or the circumstances surrounding the arrests and conversations of said witnesses with the Federal Bureau of Investigation"; second, at a pre-trial hearing held below on a defense motion to suppress, the testimony of the F.B.I. agents, who appeared as witnesses for the State, "was under the control of the ever present attorneys from the United States Department of Justice Strike Force"; and third, defense counsel were denied access to alleged purloined F.B.I. documents, with neither a government showing of the need for their confidentiality nor an *in camera* inspection of the documents by the trial court. We find no merit in these arguments.

Certainly, the Sixth Amendment right to confront witnesses entails the trial right to subject adverse witnesses to a full and effective cross-examination. *See California v. Green (1970), 399 U.S. 149.* A review of the transcript of the trial below, however, leads us to conclude that this right of appellants was in no manner infringed.

First, contrary to appellants' assertion, we find no instances in the record of the cross- and recross-examinations of Ferrito, Aratari, Guiles, and Rabinowitz by appellants' trial counsel, in which the trial court prevented defense counsel from eliciting "testimony relating to exculpatory statements, bias or prejudice, or the circumstances surrounding the arrests and conversations of said witnesses with the Federal Bureau of Investigation."

Second, we find no indication in the record of the pre-trial hearing held below that the presence of a department of Justice Strike Force attorney, as legal advisor to the testifying F.B.I.

agents, in any way prevented appellants' trial counsel from fully and effectively cross-examining these agents on matters within the scope of their authority to testify. *See*, generally, *United States, ex rel. Touhy v. Ragen* (1951), 340 U.S. 462.

Finally, while the record below reveals that appellants' trial counsel were denied access to excised portions of the alleged stolen F.B.I. documents, this denial did not result in a violation of their right to fully and effectively cross-examine state witness Rabinowitz, the former government employee charged with the theft of the documents.

Contrary to appellants' assertion, an adequate showing was made below by the government of the need for confidentiality with respect to the excised material. F.B.I. agent Michael Kahoe testified that the material excised from the documents concerned the identity of informants involved in ongoing F.B.I. investigations. (Tr. 3571) A government's privilege to withhold the identity of its informants is well established. *See Scher v. United States* (1938), 305 U.S. 251; and VIII Wigmore or Evidence 761, §2374 (McNaughton rev. 1961).

Moreover, and also contrary to appellants' assertion, the record discloses that the trial court did properly conduct an *in camera* inspection of the F.B.I. documents to determine whether the defendants' need for access to the excised portions outweighed the government's need for confidentiality. (TR 3806) *See United States v. Nixon* (1974), 418 U.S. 683; and *United States v. Reynolds* (1953), 345 U.S. 1. The trial court concluded that appellants did not need access to the excised material in order to fully and effectively cross-examine witness Rabinowitz. Appellants have not here challenged that conclusion as an abuse by the lower court of its discretion in this matter.

Finding no merit to exist, therefore, in any of the three arguments posed, we overrule appellants' Assignment of Error IX.

X.

In their final assignment of error, appellants contend that their right to due process was infringed by the insufficiency of the evidence below upon which their convictions of aggravated murder rested. In this regard, due process requires that the evidence upon which a conviction rests be sufficient to justify a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307; *In re Winship* (1970), 397 U.S. 358. We conclude that, when measured against this standard, appellants' convictions do not offend due process.

Appellants were found guilty below of complicity in the aggravated murder of Danny Greene on October 6, 1977. The State's case revolved about the testimony of appellant's co-accomplices, Raymond Ferrito, Louis Aratari, and Victor Guiles. Through their testimony, the State produced evidence of each and every material element of the offense charged.

Raymond Ferrito, who acted with Ronald Carabbia and "Butchie" Cisternino in assembling and detonating by remote control the dynamite bomb which caused Greene's death, testified concerning the conspiracy to kill Greene. He revealed that, in 1976, he had been hired by a Cleveland crime syndicate to kill Danny Greene. (Tr. 1312) After a period of inactivity and several unsuccessful attempts to set up a hit on Greene, Ferrito was informed by John Calandra, a member of the syndicate, in late August or early September 1977, that two associates of Anthony Liberatore had been assigned to aid him in the plot to kill Greene. (Tr. 1355) Thereafter, he met with these two individuals, Louis Aratari and Victor Guiles, on several occations prior to the murder of Greene. (Tr. 1359-63)

On October 6, 1977, he and Carabbia met Aratari and Guiles at Brainard Place, where Greene was scheduled for a dental appointment that afternoon. (Tr. 1398) Ferrito observed a rifle with a scope in Aratari's car. (Tr. 1399) Aratari and Guiles then left to position their car near the entrance to the building. Thereafter, Ferrito observed Greene arrive and enter the building. Aratari and Guiles, a few minutes later, returned to Ferrito's car and explained that they had missed their opportunity to shoot Greene when he arrived. (Tr. 1399)

Ferrito then told Aratari and Guiles to leave, and he and Carabbia parked a car, in which they had implanted a dynamite bomb, next to Greene's car. (Tr. 1400) When Greene later exited the building and returned to his parked car, Carabbia detonated the bomb, killing Greene. (Tr. 1400)

Louis Aratari testified that he had been recruited by appellant Lanci to kill members of the "Irish Gang". (Tr. 2103-05) Aratari, in turn, recruited his friend, Victor Guiles, to help him. (Tr. 2109) After spending some time tracking lesser members of the gang, Aratari and Guiles were assigned by Lanci to help another team of individuals who were attempting to kill Danny Greene. (Tr. 2133-34) After several meetings with the other team, composed of Ferrito, Carabbia and Cisternino, Aratari and Guiles again met Ferrito and Carabbia on October 6, 1977, at Brainard Place to carry out their plan to kill Danny Greene when he arrived for his dental appointment. (Tr. 2138-53; 2164-69; 2217-29) Aratari and Guiles failed in their effort to shoot Greene when he arrived, and were subsequently told by Ferrito and Carabbia to leave the area. (Tr. 2233-34) Before leaving the scene, Aratari saw Ferrito moving the bomb car into position next to Greene's parked car. (Tr. 2236-39) Aratari later returned alone to Brainard Place and observed the results of the explosion which had killed Greene. (Tr. 2240)

Aratari further testified to the roles appellants Lanci and Ciarcia performed in the conspiracy to kill Greene. He testified that appellant Lanci supplied him and Guiles with information on Greene's whereabouts (Tr. 2174-77), with the .357 magnum pistol and the rifle they carried on October 6 (Tr. 2115, 2194-99, 2205-08), with ammunition (Tr. 2201-02), and partially paid him for the hit on Greene. (Tr. 2265-67) Aratari revealed that Ciarcia, also a party to the conspiracy, supplied him with a car to use on October 6 (Tr. 2169-70, 2181-88, 2222-23), and provided him thereafter with partial payment for the killing. (Tr. 2254-57)

Victor Guiles, Aratari's associate, also testified for the State, and substantially corroborated Aratari's version of the conspiracy to murder Danny Greene. (Tr. 2955-3047, 3071-72)

In addition to the testimony of Ferrito, Aratari, and Guiles, the State produced a substantial amount of testimonial and documentary evidence, much of which was gathered by the F.B.I., which corroborated, to a significant degree, the testimony of these three witnesses.

Upon carefully reviewing the totality of the evidence produced below by the State, we conclude that the standard for due process, as recently enunciated in *Jackson v. Virginia, supra*, was attained, at appellants' trial. The State's case, in large part, depended upon the credibility which the jury chose to attach to the testimony of Ferrito, Aratari and Guiles. While appellants' trial counsel, in very competent fashion, zealously sought to discredit the testimony of these witnesses, the testimony of each concerning the conspiracy to kill Greene remained internally consistent and substantially in accord with that supplied by the other two. Moreover, as above indicated, the State produced a voluminous amount of testimonial and documentary evidence, which significantly corroborated the version of the conspiracy to kill Danny Greene as related to the jury by the three major witnesses.

In this State, it is well established that convictions are supported by sufficient evidence where the only challenge to that evidence is directed to the credibility of the witness supplying it. *See, e.g., State v. DeHass* (1967), 10 Ohio St. 2d 230. We hold here, similarly, that due process is not offended where a conviction depends upon the credibility attached to accomplice testimony, which is substantially corroborated to a significant degree. *Cf.* R.C. §2923.03(D) and *State v. Meyers* (1978), 53 Ohio St. 2d 74. In the trial proceeding below, a rational trier of fact, presented with the accomplice testimony of Ferrito, Aratari and Guiles, which was substantially corroborated to a significant degree by other evidence produced by the State, could have fairly found appellants guilty, beyond a reasonable doubt, of complicity in the aggravated murder of Danny Greene. Therefore, we conclude that appellants' convictions below were supported by sufficient evidence to satisfy the requirements of due process.

We finally note that appellants have argued in their brief that the evidence below showed that, prior to Greene's death, Aratari and Guiles abandoned the conspiracy to kill Greene when they were told by Ferrito and Carabbia to leave Brainard Place. This argument is devoid of merit.

The evidence clearly reveals that Aratari and Guiles, one of the two "teams" which attempted to kill Greene on October 6, 1977, departed Brainard Place, at the direction of the other team, only after their particular method of attempting to kill Greene, by shooting him with a high-powered rifle as he entered the building for his dental appointment, failed. There is nothing in the record which supports appellants' assertion that these two accomplices thereafter formulated any intent to abandon the conspiracy prior to its conclusion. To the contrary, following Greene's death, Guiles reported to appellant Ciarcia the fact of the killing and Aratari and he were paid by Ciarcia and appellant Lanci for their efforts in this regard.

On the basis of the foregoing, appellants' Assignment of Error X is overruled.

Judgement affirmed.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed. The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgement into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

KRENZLER, C.J.,
JACKSON, J., CONCUR.

/s/JOHN V. CORRIGAN
Judge

For plaintiff appellee: John T. Corrigan
For defendant appellant, Kenneth Ciarcia: Jonathan H. Soucek
For defendant appellant, Thomas Lanci: A. Richard Valore, James R. Willis and Stephen Walker

APPENDIX D

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, May Term, 1978
Cuyahoga County To-wit: August 25, 1978
No. CR-38130

STATE OF OHIO Plaintiff
vs
Thomas J. Lanci Defendant
INDICTMENT: Aggravated Arson w/ct Aggravated Murder w/specs. w/ct. Engage in Org. Crime

JOURNAL ENTRY

(Filed September 6, 1978)

This day again comes the Prosecuting Attorney on behalf of the State and defendant, Thomas J. Lanci was brought into Court, represented by counsel.

Now comes the Jury, conducted into Court by the Bailiff and returned the following verdicts in writing, to-wit: "We, the Jury being duly impaneled and sworn, do find the defendant, Thomas J. Lanci, Not Guilty of Aggravated Arson, as charged in the first count of the indictment." and "We, the Jury do find the defendant, Thomas J. Lanci, Guilty of Aggravated Murder, R.C. 2903.01, but we further find the defendant, Thomas J. Lanci, Not Guilty of Specifications one (1) and two (2), under the second count of the indictment." (Third count was dismissed."

Thereupon, the Court informed the defendant of the verdict of the Jury.

Whereupon, the Court inquired of the defendant if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is therefore, ordered and adjudged by the Court that defendant, Thomas J. Lanci be imprisoned and confined in the Columbus Correctional Facility, Columbus, Ohio, to a term of LIFE, according to law and he is to pay the costs of this prosecution for which execution is awarded.

Execution of sentence Stayed, pending Appeal.

Appeal Bond set at $250,000.00

Norman A. Fuerst, Judge
va 8/30
n-8-29

APPENDIX E

CONSTITUTION OF THE UNITED STATES

Amendment V [1791]:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV [1868]:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code:

§2923.01 Conspiracy:

(A) No person, with purpose to commit or to promote or facilitate the commission of aggravated murder or murder, kidnapping, compelling prostitution or promoting prostitution, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or a felony offense of unauthorized use of a vehicle, corrupting another with drugs, trafficking in drugs, theft of drugs, or illegal processing of drug documents shall do either of the following:

(1) With another person or persons, plan or aid in planning the commission of any such offense;

(2) Agree with another person or persons that one or more of them will engage in conduct which facilitates the commission of any such offense.

(B) No person shall be convicted of conspiracy unless a substantial overt act in furtherance of the conspiracy is alleged and proved to have been done by him or a person with whom he conspired, subsequent to the accused's entrance into the conspiracy. For purposes of this section, an overt act is substantial when it is of such character as to manifest a purpose on the part of the actor that the object of the conspiracy should be completed.

(C) When the offender knows or has reasonable cause to believe that a person with whom he conspires has also conspired or is conspiring with another to commit the same offense, then the offender is guilty of conspiring with such other person, even though his identity may be unknown to the offender.

(D) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the conspiracy was impossible under the circumstances.

(E) A conspiracy terminates when the offense or offenses which are its objects are committed, or when it is abandoned by all conspirators. In the absence of abandonment, it is no

defense to a charge under this section that no offense which was the object of the conspiracy was committed.

(F) A person who conspires to commit more than one offense is guilty of only one conspiracy, when such offenses are the object of the same agreement or continuous conspiratorial relationship.

(G) When a person is convicted of committing or attempting to commit a specific offense or of complicity in the commission of or attempt to commit such offense, he shall not be convicted of conspiracy involving the same offense.

(H) No person shall be convicted of conspiracy upon the testimony of a person with whom he conspired, unsupported by other evidence.

(I) The following are affirmative defenses to a charge of conspiracy:

(1) After conspiring to commit an offense, the actor thwarted the success of the conspiracy under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(2) After conspiring to commit an offense, the actor abandoned the conspiracy prior to the commission of or attempt to commit any offense which was the object of the conspiracy, either by advising all other conspirators of his abandonment, or by informing any law enforcement authority of the existence of the conspiracy and of his participation therein.

(J) Whoever violates this section is guilty of conspiracy, which is:

(1) A felony of the first degree, when one of the objects of the conspiracy is aggravated murder or murder;

(2) A felony of the next lesser degree than the most serious offense which is the object of the conspiracy, when the most serious offense which is the object of the conspiracy is a felony of the first, second, or third degree;

(3) A misdemeanor of the first degree, when the most serious offense which is the object of the conspiracy is a felony of the fourth degree.

(K) This section does not define a separate conspiracy offense or penalty where conspiracy is defined as an offense by one or more sections of the Revised Code, other than this section. In such case, however:

(1) With respect to the offense specified as the object of the conspiracy in such other section or sections, division (A) of this section defines the voluntary act or acts and culpable mental state necessary to constitute the conspiracy;

(2) Divisions (B) to (I) of this section are incorporated by reference in the conspiracy offense defined by such other section or sections of the Revised Code.

§2923.04 Engaging in Organized Crime:

(A) No person, with purpose to establish or maintain a criminal syndicate or to facilitate any of its activities, shall do any of the following:

(1) Organize or participate in organizing a criminal syndicate or any of its activities;

(2) Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit;

(3) Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility;

(4) Furnish legal, accounting, or other managerial services to a criminal syndicate;

(5) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis;

(6) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of violence;

(7) Commit, or conspire or attempt to commit, or act as an accomplice in the commission of bribery in violation of section 2921.02 of the Revised Code.

(B) Whoever violates this section is guilty of engaging in organized crime, a felony of the first degree.

(C) As used in this section, "criminal syndicate" means five or more persons collaborating to promote or engage in any of the following on a continuing basis:

(1) Extortion or coercion in violation of section 2905.11 or 2905.12 of the Revised Code;

(2) Compelling or promoting prostitution, or procuring in violation of section 2907.21, 2907.22, or 2907.23 of the Revised Code;

(3) Any theft offense as defined in section 2913.01 of the Revised Code;

(4) Any gambling offense as defined in section 2915.01 of the Revised Code;

(5) Illegal trafficking in drugs of abuse, in intoxicating or spirituous liquor, or in deadly weapons or dangerous ordnance as defined in section 2923.11 of the Revised Code;

(6) Lending at usurious interest, and enforcing repayment by illegal means;

(7) Any offense, for the purpose of gain;

(D) A criminal syndicate retains its character as such even though one or more of its members does not know the identity of one or more other members, and even though its membership changes from time to time.

§2945.20 Separate trial for capital offense. (GC § 13443-3)

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately. The court, for good cause shown on application therefor by the prosecuting attorney or one or more of the defendants, may order said defendants to be tried jointly.

§2945.59 Proof of defendant's motive. (GC § 13444-19)

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant' scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Rule 29 Motion for Acquittal

(A) Motion for judgment of acquittal

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

(B) Reservation of decision on motion

If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.

(C) Motion after verdict or discharge of jury

If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury.

Rule 52

(A) Harmless Error

Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(B) Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.